

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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75-1354

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P/S*

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1354

UNITED STATES OF AMERICA,

Appellee,

—against—

ALFONSO PINEROS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York*

PAUL B. BERGMAN,
ETHAN A. LEVIN-EPSTEIN,
*Assistant United States Attorneys,
Of Counsel.*

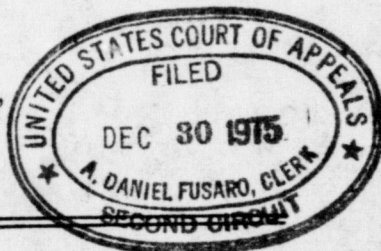


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Preliminary Statement

Alfonso Pineros appeals from a judgment entered on September 26, 1975, in the United States District Court for the Eastern District of New York (Costantino, J.), convicting him, following a three day jury trial, of knowingly and wilfully conspiring with one Jorge Rodriguez to distribute and possess with the intent to distribute, cocaine between November 21, 1973 and January 10, 1974 in violation of Title 21, United States Code, Section 846.¹ The defendant was further convicted of five additional substantive counts of possessing the narcotic with the intent to distribute it and three counts charging the actual distribution of cocaine, all in violation of Title 21, United States Code, section 841.

¹ Appellant's co-defendant, Rodriguez, had previously entered a plea of guilty to Counts 1 and 9 and was severed from the case.

Appellant was sentenced to a term of imprisonment of seven years on each count, the sentences to run concurrently. In addition, a ten year special parole term was imposed, the defendant to be deported at the end of his imprisonment. Appellant is currently serving the prison term imposed.

On this appeal appellant argues that reversible error was committed when the District Court permitted appellant's expert witness to be cross-examined on his failure to consider certain psychological data in forming his psychiatric opinion of appellant. Appellant argues that the data had not previously been supplied to the defense.

Statement of the Case

A. Introduction.

We believe that this is a case in which, as Judge Medina remarked in *United States v. Brown*, 511 F.2d 920, 924 (2d Cir. 1975), "an utterly insignificant colloquy is blown up to make it look like a legitimate point for reversal." Indeed, appellant's brief, in the portion devoted to stating the case, deals exclusively with the supposed point of reversal without any description of the extensive pre-trial discovery given appellant, the facts of the crime itself, or the testimony of the government's psychiatrist, David Abrahamsen.² We must accordingly respond by describing the relevant pre-trial and trial proceedings. First, we set forth the essentially undisputed facts of the appellant's participation in the sale of cocaine, in late 1973 and early 1974, to federal undercover agents.

² Thus, appellant is content to describe Abrahamsen's testimony as follows: "On its rebuttal case the Government called Dr. David Abrahamsen, a psychiatrist, as its only witness." (Br. 11).

B. The Government's Case in Chief.

The Government called only two witnesses in its direct case, Special Agents Kieran Kobell and Michael S. Gray of the Drug Enforcement Administration.

Special Agent Kobell testified that he first met appellant in November, 1973, while working in an undercover capacity with Agent Gray on an investigation centered in Manhattan (T. 30). Specifically, on November 29, 1973, Agents Kobell and Gray went to an apartment belonging to one Lilia Prada (T. 33). It was on this night that they first met the appellant, who was introduced as "Gilberto" (T. 34).³ During the ensuing meeting with Prada the agents negotiated with her and one Reuben Guitterez for the purchase of cocaine (T. 37). During this conversation the appellant was seated in the kitchen, some nine or ten feet away (T. 38).

Repeatedly, as offers were made to Prada and Guitterez by the agents, they would go into the kitchen, have a brief conversation in Spanish with appellant and return to the negotiations with a counter-offer (T. 38-40). After the negotiations were concluded and as the agents prepared to leave, they shook hands with all present, including appellant. As Kobell shook hands with appellant a small piece of paper was slipped to the agent in the palm of his hand (T. 41). Examination of this paper, after they left the apartment, revealed that on it was written the name "Gilberto", the number "4299337" and the time "3 P.M. 4 P.M." (T. 44).

On the following day, November 30, Kobell called this number at the designated time and appellant answered. He identified himself and introduced Kobell to his "partner" "Georgie". Kobell and "Georgie" dis-

³ Appellant was also known as Gilberto Amaya.

cussed the fact that "Georgie" was appellant's partner in the cocaine business and that they were desirous of doing business directly with the agents, thereby eliminating the intermediary, Prada (T. 45-48). To this end a meeting was arranged for the four of them at a restaurant in Manhattan. Later that night they met, as planned, and continued their discussions (T. 47).

Both appellant and his partner actively participated in the conversation, during which the agents were supplied with a sample of the cocaine they were told could be provided in bulk, a price list and another card bearing a telephone number where appellant and Rodriguez could be reached (T. 48-62). It was further agreed, at appellant's specific request, that any transaction would take place in a very specific manner and that payment would be made in one hundred dollar bills.

The agents' next contact with appellant and Rodriguez (as he had previously been identified at the restaurant) occurred on December 6, 1973, when Agent Gray was called by Rodriguez (T. 145). They agreed to meet, later that day, at a diner on Queens Boulevard in Queens. Gray met Rodriguez at the appointed time and they discussed the purchase of one-eighth kilogram of cocaine (T. 146). They discussed the details of the purchase and inspected the apartment in Queens where the transfer was to be made (T. 147). It was agreed that they would discuss the transaction further later that evening (T. 151).⁴ That night Gray called appellant and, with the use of previously agreed upon code words, confirmed the arrangements (T. 152-153).

On December 10, 1973 the agents, appellant and Rodriguez agreed to meet on the following day at the Queens

⁴ This meeting was recorded by surveillance agents on a video tape which was shown to the jury (T. 154-161).

diner, to complete the deal (T. 161-162).⁵ On December 11, the agents met appellant and his partner, as planned, at the Wetson's restaurant on Queens Boulevard (T. 63; 167). The four of them conversed inside the restaurant, the appellant again actively participating. They discussed the arrangements for the sale of the eighth-kilogram of cocaine and the payment of the money (T. 63-65; 167-168). Gray and the appellant then went to appellant's apartment, where the cocaine was measured, tested, weighed and transferred (T. 168-193).⁶

The agents continued to maintain contact with appellant and Rodriguez. On the next day Rodriguez called Gray (T. 203), and on December 19, 1973 appellant and Kobell spoke on the telephone (T. 87), each time confirming the likelihood of future transactions. As a result of these and other conversations the two agents met with appellant and his partner on January 9, 1974. They, again, met at the Wetson's restaurant on Queens Boulevard (T. 87; 204).

At this meeting the agents asked appellant and Rodriguez if they could supply a full kilogram of cocaine. Appellant stated that although they had had that much available during the previous week, they were down to about a two-eighth-kilogram stockpile (T. 88; 204). Rodriguez indicated that he might be able to get the cocaine, however, and placed a telephone call from a phone booth. After the call he had a short conversation with appellant in Spanish and announced that the kilogram

⁵ This communication was also recorded and the tape was played for the jury (T. 163-167).

⁶ All conversation between Gray and Pineros was recorded and the recording was played for the jury. In addition, the meeting at the Wetson's was videotaped and displayed to the jury (T. 78-83; 168-193).

was available at a cost of \$31,000 (T. 89; 205). When asked about the quality of this new cocaine, appellant replied that it was of Bolivian origin and that he would provide them with a sample on January 10 (T. 89; 205).

After this was agreed to, the four left Wetson's and drove back to appellant's apartment to inspect the two eighth-kilograms of cocaine they did have. The narcotics were produced by appellant, measured, tested and a sample was given to the agents (T. 89a-93; 206-207). After the meeting in the apartment arrangements were made to meet the following day, January 10, 1974 (T. 210).

On January 10, 1974, after a telephone call was received from Mr. Rodriguez,⁷ Agents Gray and Kobell met them at the Wetson's Restaurant. Once again Agent Gray wore a recording device (T. 93; 217). The tape of the entire conversation between Gray and appellant was played for the jury (T. 222-227). During, or incident to, this conversation, the promised sample was received (T. 95) and appellant indicated that he was ready with the full kilogram, at the apartment (T. 219).

Gray and appellant drove to the apartment where appellant brought out the two eighth-kilograms he had shown to them the previous day and the new, Bolivian cocaine (T. 228-230). At a pre-arranged signal, following this final purchase, both appellant and Rodriguez were placed under arrest (T. 96; 230). After the arrests, a search of the apartment, authorized by a warrant, resulted in the seizure of the remaining cocaine and \$6,000 in cash (T. 97-99; 231).

⁷ Actually there were two conversations, both recorded on the same tape (T. 211). The first short conversation consisted of Gray telling Rodriguez that he would call him back shortly, which he did, approximately five minutes later (T. 212-214). The entire tape was played for the jury.

C. The various pre-trial psychiatric examinations concerning appellant's competency to stand trial.

Following his arrest, appellant acted in an erratic fashion. Accordingly, Judge Judd, the District Judge before whom appellant first appeared (the case was later assigned to Judge Costantino), ordered a competency examination of appellant under Title 18, United States Code, Section 4244. There followed a series of five separate psychiatric examinations of appellant stretching through to March, 1975. Appellant's competency improved with each successive report, until, finally, in March, 1975, the last psychiatrist, Dr. Weiss, (who was retained by appellant's counsel and who also was retained for the purpose of assessing appellant's sanity at the time of the crimes), concluded that appellant was presently competent and that there was "no psychiatric evidence to indicate that Mr. Pineros was not mentally responsible at the time [November and December, 1973 and January, 1974]" (GA 4).⁸ For the convenience of the Court, we set out, *seriatim*, a brief summary of each of the five reports.

1. Dr. Schwartz' report of February, 1974.

In his first report, Dr. Daniel Schwartz, Director of the Kings County Hospital Center Forensic Psychiatry Service, diagnosed an "unspecified psychosis", concluded that appellant was not, at that time, competent to stand trial, but noted that this may well be "... an acute reaction to having been arrested on serious charges . . ." Dr. Schwartz continued by stating that "... the patient may well recover within a reasonable period of time." (A. 93-94).

⁸ Page references preceded by "GA" refer to pages in the Government's Appendix. References preceded by "A." refer to pages in the Appellant's Appendix.

2. Dr. Eardley's report of April, 1974.

In a report dated April 17, 1974, Dr. Jack Eardley, of the U.S. Medical Center at Springfield, Missouri, informed the Court that, as of that time, appellant was presently ill and not competent to stand trial" (A. 95). Attached to Dr. Eardley's report were copies of a "Report of Psychiatric Evaluation," dated February 28, 1974 and a "Report of Psychiatric Staff Examination," dated April 2, 1974 (A. 96-98).

3. Dr. Varhely's report of November, 1974.

In his report, dated November 18, 1974, Dr. Emry A. Varhely, the Associate Director of Mental Health at Springfield, stated that it was the opinion of the professional staff that appellant was competent to stand trial. Dr. Varhely included with his report to Judge Costantino copies of the hospital chart records which showed the nature of the study of appellant. These enclosures consisted of a "Report of Psychiatric Evaluation", dated October 10, 1974, a "Psychologists Report on Testing and/or Evaluation", dated October 25, 1974, an "Addendum to Report of Psychiatric Examination", dated November 6, 1974 and a final "Report of Psychiatric Staff Examination", dated November 6, 1974 (A. 99-108). In these reports it was clearly stated that numerous psychological tests had been performed on appellant at Springfield (A. 104).

4. Dr. Schwartz' report of February, 1975.

On February 6, 1975, the Court, once again ordered that appellant be examined by Dr. Schwartz at Kings County Hospital. In his report, dated February 19, 1975, Dr. Schwartz informed Judge Costantino that the

appellant was suffering only from some "unspecified personality disorder", but that he was "not presently insane or otherwise so mentally incompetent so as to be unable to understand the proceedings against him or to properly assist in his own defense" (A. 109-113).

5. Dr. Weiss' report of March 1, 1975.

Dr. Norman Weiss, a psychiatrist, examined appellant at the end of February. He had available all of the previous psychiatric reports as well as transcripts of appellant's conversations with the agents. Weiss's examination was directed toward determining appellant's present competency and appellant's "mental status" at the time of the offense. In each case, Weiss found appellant mentally fit. Thus, he concluded that the transcripts "did not demonstrate any of the thinking disorder" that was described by Dr. Schwartz following Schwartz' first examination of appellant (GA 3-4).⁹

D. Pre-trial discovery proceedings.

In early 1975, when it was apparent that appellant was regaining his mental competency, defense counsel, Barry Krinsky, Esq., requested informal discovery as to a number of matters (see letter, GA 1). Copies of psychiatric reports were not requested by defense counsel because copies of all those reports which had previously

⁹ It should be noted that a copy of Dr. Weiss' report, which would have offered a potent basis for cross-examining Dr. Rendon, appellant's psychiatrist, was never given to the government prosecutor prior to or at the trial despite a promise by defense counsel that it would be provided (GA 8). We impute no untoward motive, recognizing that if we had, at a later time, requested a copy of the report, it would have been provided; as it was during the preparation of this brief. Upon request to Dr. Weiss, a copy of the report was provided during the preparation of this brief.

been prepared had either been turned over contemporaneously to counsel or had been sent directly to counsel. Nevertheless, if there was any question that counsel had all of the reports, it was resolved in February when copies were again provided by the Assistant and reciprocal discovery was requested (A. 84).

It was during this period of time that Dr. Weiss' report was prepared. Accordingly, a pre-trial conference was held on March 14, 1975 at which Dr. Weiss' report was given to the Court by Mr. Krinsky. Going beyond the report, counsel for appellant remarked "so the record is completely clear on this issue" (GA 8) that Dr. Weiss had had available the transcripts of appellant's conversations with the agents, that Weiss had concluded that there was no ambiguity in appellant's mental condition and he was competent to stand trial (GA 10). After appellant was found competent by the Court, defense counsel stated that the possibility of a disposition was under discussion with the Assistant United States Attorney and suggested that "if at all possible to set this case down for a date either one or two weeks from today to advise the Court whether [a] disposition is possible or whether . . . we actually have to go through with a trial" (GA 11).

On April 29th, Krinsky appeared before the Court and requested permission to be relieved as counsel. Krinsky remarked on the "complete disclosure on the part of the Government in terms of their entire file." He remarked of his "innumerable conversations" with appellant and his belief, until just prior to the day's proceeding, that appellant would accept a disposition of the charges. Nevertheless, Krinsky advised the court that he and the defendant, who was "urging" Krinsky to proceed with [a] line of defense, had reached an "irreconcilable roadblock" (GA 17). Accordingly, Krinsky

asked to be relieved of his assignment. This request was granted.¹⁰

Thereafter, in May, new counsel, Ira Leitel, was appointed to represent appellant. On July 21, 1975, the Monday which had been set for trial, Mr. Leitel announced to the Court and government counsel that, since the previous Friday he "did a lot of hustling to find the psychiatrist" (GA 27); that he had found one who he "suspected[ed] . . . will testify for the defendant with regard to responsibility;" but from whom he had yet

¹⁰ In granting the request, Judge Costantino remarked, and Krinsky responded (GA 19-20):

The Court: I must say, Mr. Krinsky, you have been in my Court many times and the Court likewise has appointed you, likewise, to represent defendants, and each time you have exercised a great deal of diligence in representing defendants, and you also have represented them with the interest of the party to whom you have been assigned. I find no reason, if you decide you should withdraw from a case that I should be the one to insist that you continue to represent a man when you know, as an attorney with an excellent reputation, and full of dignity and decorum—therefore under the conditions, knowing the length that this case has been before the Court, tremendous amount of work you have exerted and also on behalf of the defendant, likewise in your consultation with the U.S. Attorney in attempting to arrive at some disposition without the assistance of the Court, since the Court cannot partake in any of those dispositions, I think for the interest of all concerned, the Government, the defendant and the Court, I should relieve you of your obligation at this time in representing this defendant.

The Court will appoint a new lawyer for him.

Mr. Krinsky: I also say for the record, any new lawyer who is in fact assigned, I will stand ready to give copies of my entire file and will feel free to consult with him and tell him anything that could be of any help to any new attorney, anything that could be of any help to Mr. Pineros (GA 19-20).

to receive a written report (GA 28). The Assistant United States Attorney's request for a two day adjournment in order to secure an examination by another psychiatrist was, of course, granted.

We think it important to note, at this juncture, that if new counsel for appellant had received Krinsky's entire file (which he did, we suppose) he would have had in his possession at the time all of the previously described (*supra*, at 7-9) psychiatric materials.¹¹ In addition, he would have had transcripts of the several conversations involving appellant.

All of these materials were available for examination by the defense psychiatrist who, it is assumed, would have had to realize that the psychiatric reports were not the sole written indicia of appellant's stay at Springfield or his examination by Doctors Schwartz and Weiss. Thus, even if Dr. Rendon was not familiar with medical logs and the various psychiatric tests that are routinely performed on mental patients, an unlikely ignorance, he (as well, of course, as defense counsel) would have read the following in the reports:

—"The patient appeared to be oriented but was unable to do Serial VIIs or interpret proverbs in an abstract manner", *Report of Psychiatric Evaluation*, dated February 28, 1974 (A. 96).

—"He [appellant] has been undergoing psychiatric evaluation for the past 38 days. He was given his orientation upon his arrival by a trained senior officer specialist. He was seen on the first working day by a staff psychiatrist, a psychiatric nurse and then daily while in lock up."

* * * * *

¹¹ Moreover, he would have had the report of Dr. Weiss which the Assistant United States Attorney did not have.

"He was given a physical examination as well as laboratory tests and x-rays"

He was interviewed and evaluated by H. B. Fain, M.D., Psychiatrist."

* * * * *

"Finally, he was seen today by the below listed staff who interviewed him, studied his present chart and previous reports . . .". *Report of Psychiatric Staff Examination*, dated April 2, 1974 (A. 98).

—"Due to the language barrier present the following psychological tests were given: Rorschach Ink Blot Test, Bender-Gestalt-Motor-Visual Test, House-Tree-Person Test, along with a clinical interview".

* * * * *

"Since we have no objective measure of his intellectual functioning the examiner's impression is based upon his responses to the Rorschach as well as information gathered from clinical interview. * * * The Bender-Gestalt was drawn quite adequately which would rule out any sign of organic factors present. The Bender was also typically the kind found in a person with normal intellectual abilities."

* * * * *

"On the Rorschach Test we find there is no indication of thought disturbance present. There was no sign of psychosis nor were there any signs of organic factors operating. * * * The House-Tree Person projective test is in keeping with the Rorschach findings . . ."

* * * * *

"The psychological tests even though they were limited in nature along with the clinical interview

would tend to indicate an individual with dyssocial behavior. There are no signs of organic or psychotic behavior present in this patient", *Psychological Test Report*, dated October 25, 1974 (A. 104).

"Psychological testing was limited to the apparent language barrier the patient presented. He was given the Rorschach, Bender-Gestalt and House-Tree-Person Tests and was interviewed by Dr. Clifford Whipple, Consulting Psychologist."

* * * * *

"Physical examination and laboratory testing have all been within normal limits." *Report of Psychiatric Staff Examination*, dated November 6, 1974 (A. 105-106).

E. The insanity defense.

Appellant testified on his own behalf, with the aid of an interpreter (T. 265). He stated that he was born in Columbia, South America, although he could not remember in what year (T. 270). He claimed that in 1958 he was hospitalized in a mental institution for three months following an incident in which he claimed to have mixed alcoholic beverages and some kind of pills (T. 271-272). He claimed an attempted suicide, for which, he said he received some sort of electric shock therapy (T. 273). In 1960, he testified, he travelled to the border city of Cucuta, where he suddenly, and inexplicably, found himself in a hospital where he was told that he was a doctor, that he had gangrene and had to operate on himself (T. 274), which he said he did.

Appellant continued, in a rather disjointed and unresponsive manner, by describing his marriage and his mental state during the 1960's (T. 275- 279). With the

Court's permission, counsel for appellant offered a medical report about the appellant's condition following an automobile accident which occurred in 1971 (T. 280-284), concluding with the Columbian physician's conclusion that, as of November 23, 1972 the patient's electro-encephlogram was normal and "[t]he post-traumatic mental syndrome had also disappeared." (T. 284).

Appellant described how, in early 1973, he suddenly found himself in New Orleans, Louisiana, and then in New York (T. 292-294) where he met a man named Reuben. Appellant claims to have had amnesia from November, 1973 until he "awoke" in the hospital in Springfield, Missouri (T. 295). He specifically denied any recollection of the events described by agents Kobell and Gray (T. 307-311).

Appellant's next, and final witness was Dr. Mario Rendon, a psychiatrist (GA 37). He testified that he had been in practice for four years in the United States (GA 38) and that this occasion was his first to be qualified as an expert witness (GA 39). Dr. Rendon stated that he had examined the appellant, in jail, in preparation for his testimony, and further had examined the previous psychiatric reports (GA 41). He also stated that he had examined the transcript of the recorded conversation between appellant and Special Agent Gray made January 10, 1974 and the two conversations from December 11, 1973 (GA 39-45). Finally, Dr. Rendon had read reports dating back to 1971 from Columbia which involved a trauma allegedly suffered by appellant.

Based on his examination of the appellant, the reports and the medical reports from the various hospitals, Dr. Rendon came to the conclusion that "... this patient has been possibly mentally disturbed from adolescence." (GA 50). Dr. Rendon listed three bases upon which he relied

for his opinion: First, appellant's description of his own therapeutic history. Second, an impression that appellant's "sentences" in the transcripts were symptomatic of a "thinking disturbance", and; Third, apparently "bizarre" thinking on the part of the appellant (GA 52).

Although pressed for a diagnosis by defense counsel, Dr. Rendon never really stated his diagnosis of appellant's condition at all (GA 52-68). In fact, Dr. Rendon, while noting that whatever opinion he did have was dependent in large measure on appellant's providing him with information, was candid enough to make the following statements:

"As I stated in my written opinion, I believe there could be two ways to interpret [what the appellant said]:

Number 1: Just by the simple fact that the patient may be faking or lying or making believe;

Number 2: That the patient is what we call confabulating, means [sic] that there are gaps in the memory or there are gaps in the thinking, and the patient tried [sic] to fill those gaps with his own version, with his own imagination, trying to put them together" (GA 54).¹²

Dr. Rendon actually went on to state that he could not, and therefore did not, form *any* clear opinion of appellant's mental state at the time of the offense. In response to the critical question, on direct examination of what his opinion was of appellant's mental state during the only relevant periods, November and December of 1973, and January, 1974, Dr. Rendon frankly responded as follows:

¹² The written opinion of Dr. Rendon is reproduced at page 114 of Appellant's Appendix.

"I cannot commit myself to a definite opinion about his mental health at that time. If my suspicion is correct, this man had a mental disturbance, fluctuating, and I cannot say how he was at the time during those months. All I can say is based on these transcripts, which of course are subject to interpretation of the tapes or mistakes or whatever, but I think on those transcripts there is a basis to believe that there is some degree of thinking disturbance."

The doctor added that:

"It is obvious that after the arrest he was very disturbed, very sick, but that does not mean that he was like that before the [first report following his arrest]" (GA 62).

During cross-examination it was shown that Dr. Rendon had examined appellant for two hours at the Federal Detention Headquarters, and that this examination consisted mainly of the patient answering the doctor's questions and providing him with information (GA 70-72). Although he read the transcripts of the tapes, Dr. Rendon had not asked to hear the tapes themselves, nor did he ask to view the videotapes which actually showed the patient's behavior during the pertinent period (GA 73). Although Dr. Rendon made use of the pharmaceutical reports from Columbia and he did not think it was his "function" to unearth the medical records which may have existed in Columbia.

In the same manner, during the cross-examination of Dr. Rendon, the Assistant United States Attorney briefly questioned him concerning his examination of appellant's medical records kept at the Federal Detention Headquarters (West Street) as well as the underlying

psychological tests which had been conducted on appellant while he was at Springfield (see Government Exhibits 27 and 28, for identification, reproduced in Government's Appendix on pages 161 and 174). With respect to Exhibit 27, which consisted of the West Street medical records, Dr. Rendon acknowledged that he did not know they existed and that he had not examined them. Moreover, he did not consult with any of the doctors who may have treated appellant at West Street (GA 74-75). No objection was taken by defense counsel to this line of questioning. When, however, the Assistant began questioning Dr. Rendon concerning his knowledge of the psychological tests conducted at Springfield, defense counsel objected, claiming that he had never previously been shown the underlying reports.¹³ Counsel's objection was overruled and counsel for the United States proceeded to ask a few brief questions of Dr. Rendon the sum of which was to show that Dr. Rendon had not previously examined the various "medical reports", "everyday reports" and drawings which had been made by the defendant (GA 78).

It should be noted that during the foregoing questioning of Dr. Rendon, the contents of Exhibits 27 and 28 were never read to the jury or otherwise made known. Moreover, they were never offered in evidence.

¹³ When it became known that appellant would be claiming, in earnest, that he was not criminally responsible for his acts in late 1973, the Assistant United States Attorney requested a copy of the entire file that the Medical Center at Springfield had compiled as well as appellant's medical records at West Street in Manhattan. They eventually became the embodiment of Exhibits 27 and 28. Both exhibits have been reproduced in our appendix (GA 161-209) in their entirety. The Court will note, accordingly, that Exhibit 28, particularly, contains duplicates of the psychiatric reports previously mentioned. Exhibits 27 and 28, we note, were received *after* Dr. Rendon examined appellant.

In addition, it was elicited from appellant's psychiatrist that he had never confirmed, or tried to confirm, any of the information provided by appellant (GA 79-81; 84-85). As he explained: "I didn't think it was my function" (GA 79). Thereafter, Dr. Rendon readily admitted that he could not distinguish when appellant was lying or telling the truth (GA 86).

At the end of the cross-examination Dr. Rendon told the jury that he had absolutely no experience, prior to this case, in making a determination as to a patient's criminal responsibility at the time of an illegal act (GA 102-103).

F. The Government's Case in Rebuttal.

The Government's sole witness to rebut defendant's claim of lack of criminal responsibility was Dr. David Abrahamsen, a psychiatrist who, for more than forty years, specialized in the psychology and psychiatry of criminals and their behavior (GA 117-128).

Dr. Abrahamsen testified that he too had examined appellant with a view towards rendering an opinion as to his criminal responsibility or lack thereof in the critical months (GA 128-129).

Dr. Abrahamsen told the jury that, with the aid of the same interpreter assisting appellant at trial, he examined him on July 21, 1975 (GA 129). Prior to this examination, however, Dr. Abrahamsen studied many documents and papers related to the case, heard the tape recordings and reviewed the video tapes.¹⁴

¹⁴ Dr. Abrahamsen read Dr. Rendon's report before he testified, but not before he examined appellant (GA 130).

After poring over the background material, hearing the tapes, seeing the films and interviewing the witnesses, Dr. Abrahamsen then examined the appellant (GA 134). During the examination, which occurred in the doctor's office, appellant claimed to be amnesiac for the period of November, 1973 to January, 1974 (GA 135). Although he admitted speaking English, he denied any memory or knowledge of the facts of the case (GA 135-136).

Dr. Abrahamsen described appellant as "evasive" and disingenuous about his amnesia (GA 136). He questioned the veracity of the "amnesia", pointing out that, in his experience, the broad, massive amnesia described by this patient was virtually unheard of (GA 136).

The doctor noted that appellant was, in his expert opinion, "quite smart", an impression borne out by the behavior displayed in the video tapes. The tapes, said the doctor, "showed . . . a man who was very coherent. He talked and he smiled. He was very active. He was not stupid at all and he certainly didn't have amnesia."

"He was—he acted quite normally in the course of business, trying to do business with the agents. There was nothing mentally wrong with him, as far as I was able to see." (GA 137).

The tape recordings of the conversations did nothing to alter Dr. Abrahamsen's opinion. In fact they were wholly consistent with the doctor's prior evaluation of a normal man (GA 137).

Dr. Abrahamsen continued his testimony, pointing out specific illustrations of appellant's shrewd and obviously normal mental state, (GA 139-140), examples of his awareness of his surroundings and circumstances (GA 141-142) and that he was cautious and prudently discreet about his criminal activities (GA 142-143).

In sum, Dr. Abrahamsen voiced the diagnostic opinion that the "psychotic" or "insane" behavior that appellant showed was simply an artificial attempt to provide symptoms that weren't there. In short, he was malingering or faking (GA 144). The final question and answer of Dr. Abrahamsen's direct examination was as follows:

"Q. Doctor, based on all of what we have discussed, your evaluation of the physical evidence, your examination of the tapes, your observations of the video tapes, your personal psychiatric and physical examination of the defendant, your review of the reports, the medication given, the psychological background data, and everything that you have seen in this case, doctor, have you been able to form an opinion based upon your professional expertise as to whether or not the defendant sitting here in court today at the time in November, December of 1973 and January of 1974, was suffering from a mental disease or defect at that time?

A. Yes.

Q. What is your opinion, sir?

A. Defendant did not suffer from any mental disease or defect at that time and he did not lack substantial capacity to know or to appreciate the wrongfulness of his conduct or to conform his behavior to the requirements of the law." (GA 144-145).

After Dr. Abrahamsen's testimony, the Government rested its case.

ARGUMENT

The District Court properly permitted Government counsel to cross-examine Dr. Rendon, in a limited fashion, concerning his failure to study the underlying test results which were referred to throughout the various psychiatric reports.

Appellant contends that it was error to permit the Assistant United States Attorney to cross-examine Dr. Rendon about his failure to examine the data underlying the psychiatric reports. Implicitly recognizing that cross-examination of that nature is fully appropriate, see Rules 703 and 705, Federal Rules of Evidence; *W. Horace Williams Co., Inc. v. Serpas*, 261 F.2d 857, 860 (5th Cir. 1959); *Mims v. United States*, 375 F.2d 135, 144 (5th Cir. 1967); *Cf. United States v. Bohle*, 475 F.2d 872, 874 (2d Cir. 1973), appellant argues that the late revelation of the reports of the various tests which had been conducted by the previous psychiatrist in the case somehow prohibited this line of cross-examination. Thus, appellant claims that the failure to "disclose" the data earlier precluded what must have been a particularly galling line of cross-examination.¹⁵

We think that appellant's contention, which is exaggerated in certain spots, also needs to be sorted out.

¹⁵ We say "galling" because the cross-examination of Dr. Rendon was the ultimate result of a last ditch effort by the appellant to defend against the charges. The concomitant lack of adequate preparation by the defense inevitably produced a situation where the testimony of the defense psychiatrist, which on its face was hardly convincing, was made to look all the more inadequate because Dr. Rendon was shown not to have familiarized himself with any of the underlying materials in the case or to bother verifying other matters.

When it is so sorted, and when its exaggerations are recognized we believe that this Court will find that no error was committed and that the worst that can be said of the conduct of the trial is that the Assistant United States Attorney should not have put the "last nail in the coffin" by marking exhibits 27 and 28 for identification. Cf. *United States v. Cotreni*, — F.2d — (2d Cir. Slip Op. (typed) p. 5., decided December 22, 1975). Thus, the Assistant United States Attorney could have accomplished the very same kind of effect by simply cross-examining Dr. Rendon on his failure to call for the various tests which were clearly mentioned in the reports. As a practical matter, all that Exhibits 27 and 28 accomplished was the physical confirmation that tests had been conducted and various logs kept. Thus, the cross-examination did not involve the substantive use of the data sheets, but merely the fact of their existence; a fact which had already been disclosed in the reports previously made available. Of course, for the same reasons that the cross-examination would have been just as effective had only the reports been used, it must be recognized that the cross-examination, had it been so conducted, would not have provided appellant with the pretext for his contention on appeal. It can be seen, then, that there was really no true nexus between the so-called failure to provide discovery and the type of cross-examination employed by the Assistant United States Attorney.

Several other, less significant features of appellant's contention should be recognized: First, the Court should note that at no time did present or previous defense counsel in the case move for discovery of medical reports pursuant to Rule 16(a)(2). Thus, *United States v. Kelly*, 420 F.2d 26 (2d Cir. 1969) upon which appellant relies, is inapposite because in that case an appropriate motion had been made.

It should also be noted that the material about which appellant now complains was not received by govern-

ment counsel until after Dr. Rendon had completed his examination of appellant. Against that fact is appellant's claim that these documents were "relevant and indeed critical to Dr. Rendon's diagnosis" (Appellant's Brief, at 13).¹⁶ However, this assertion is not borne out by counsel's stance at trial. Not once, after he claimed to have been "surprised" by the government, did appellant's attorney request a continuance so that his witness could examine this "critical" evidence. Not once did he even request a short recess so that Dr. Rendon could see what it was that was so "relevant" to his diagnosis. Further, not one question was asked on re-direct in order to determine whether or not this material was important or not to Dr. Rendon (T. 350-352; 390). In fact, from Dr. Rendon's testimony itself, it appears that he would hardly have considered this material as crucial as appellant now contends on this appeal (GA 73-75; 79-81; 84-85; 105-106; 112-113).

Thirdly, it should be recognized that at no time in the District Court did appellant's counsel object to the use of the documents contained in Exhibit 27. Counsel's sole objection was based upon the use of the documents comprising Government Exhibit 28; the documents from Springfield.

¹⁶ While we do not press the argument, we cannot help but note the recent trend in which government counsel are "sandbagged," intentionally or otherwise, as a result of the inadequate trial preparation by defense counsel. See *United States ex rel. Washington v. Vincent*, — F.2d — (2d Cir. Slip Op. 373, 374; decided November 5, 1975); *United States v. Stofsky*, — F.2d — (2d Cir. Slip Op. 515, 528; decided November 7, 1975). Thus, defense counsel's inadequate preparation of the defense psychiatrist has been turned on its head into a charge that the government prosecutor failed to "disclose" material, when at all times the government willingly cooperated with all defense requests.

Fourth, appellant's bare claim of prejudice is never explained. Thus, although the failure to provide discovery under Rule 16 may, in some cases be error, see e.g., *United States v. Padrone*, 407 F.2d 560 (2d Cir. 1969), compare, *United States v. Johnson*, — F.2d — (2d Cir. Slip Op. 331; decided October 30, 1975) this Court has consistently required that there be some showing of prejudice. Appellant's bare claim of prejudice, is never explained. Thus, in contrast to the *Padrone* case, it can hardly be stated that defense strategy was, in any way, affected.¹⁷

CONCLUSION

The judgment of conviction should be affirmed.

Dated: December 24, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
ETHAN A. LEVIN-EPSTEIN,
Assistant United States Attorneys,
Of Counsel.

¹⁷ Indeed, it appears that if any side was deprived of discovery, it was the government. Thus, Dr. Weiss' report was never made available to the government. Moreover, Dr. Rendon testified that he conducted a series of tests with appellant that the doctors at Springfield were not able to perform (GA 65-66). Yet, none of the underlying data from these tests was turned over to the Government. Moreover, in light of these many specific references to the underlying materials which are at the heart of this appeal, it is disingenuous, to say the least, for appellant to now claim that "[d]efense counsel was informed that there were no other medical reports, examinations or tests pertaining to the defendant." (Appellant's Brief, 13). While literally true, such a statement can scarcely be considered other than misleading.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

----- EVELYN COHEN -----, being duly sworn, says that on the 29th
day of December, 1975, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, a BRIEF FOR THE APPELLEE
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

----- Ira Leitel, Esq. -----

----- 188 Montague St. -----

----- Brooklyn, N.Y. 11201 -----

Sworn to before me this
29th day of Dec. 1975

[Signature]
EVELYN B. COHEN
Notary Public, State of New York

No. 24-06
Qualified in Kings County
Expires March 30, 1977

[Signature]

----- Acción ----- No. -----

UNITED STATES DISTRICT COURT
Eastern District of New York

THE NOTICE that the within
for settlement and signa-
of the United States Dis-
office at the U. S. Court-
man Plaza East, Brooklyn,
e ----- day of -----,
o'clock in the forenoon.

New York,

-----, 19-----

States Attorney,
for -----

-----Against-----

United States Attorney,
Attorney for -----
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

KE NOTICE that the within
of ----- duly entered
----- day of -----

-----, in the office of the Clerk of
ct Court for the Eastern Dis-
ork,
n, New York,

-----, 19-----

States Attorney,
ey for -----

Due service of a copy of the within -----
----- is hereby admitted.
Dated: -----, 19-----

Attorney for -----